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CURRENT LEGISLATION

SHARES WITHOUT PAR VALUE.—It is interesting to note that there is nothing revolutionary or even novel in the concept of corporate shares without nominal or par value. In the joint stock companies of the Elizabethan period in England, the forerunners of the modern corporation, the share was used "in the natural sense, namely as an appreciable part of the whole undertaking, not as a multiple of units of the capital".¹ Among the corporations of the eighteenth century in America, a number may be found issuing stock without par value.² Nor is the share without par value unknown in Continental Europe to-day. In Prussia, notably, provision has been made for such stock in laws governing mining corporations.³

A par valuation was undoubtedly first given to each share of stock to denote that it represented money or property of the corporation equal to that amount. Even in cases, however, where stock with par value is fully paid in cash or in property taken at its actual value, practical experience has shown that it is quite impossible to maintain a constant equilibrium between the nominal capitalization of a corporation and its assets. *A fortiori*, when such intangible and problematical assets as good will and expectancies are capitalized, a share can represent only an aliquot part of the total assets, whatever its par value may be. The nominal face value thus is almost always a fiction and one which the courts themselves disregard when recognition of it would be inequitable.⁴

In theory, it may well be that "watering stock" accomplishes no evil, that an increase in the amount of outstanding stock without a corresponding increase in assets injures no one. That justification pre-supposes, however, that all purchasers of stock are insensible to the magic of the stamped, the represented par value and realize that what they are buying is nothing more nor less than a proportional interest in the corporation. In fact the represented value does influence the purchaser and does oftentimes tend to bolster up the price of the stock above its real value.⁵

A great discrepancy between the nominal capitalization and the value of the holdings of a corporation furnishes an opportunity to defraud inexperienced purchasers. To such discrepancies may be traced much of the popular mistrust and suspicion of corporations generally. The substitution for shares with a par value, of shares with no nominal valuation, would put the investor on guard, and would dispel misunderstanding on the part of the public. "Demagogy would lose part of its food".⁶

From the view point of the corporation, too, considerable advantage is to be derived from the use of shares without par value. No longer will a

¹ 1 Scott, *Joint Stock Companies to 1720* (1912) 45.

² Davis, *Essays in the Earlier History of American Corporations*, I, 87, 88; II, 277, 284, 299.

³ 3 Grotefend & Cretschmar, *Preussisch-deutsche Gesetzsammlung* (1904) 702, cited in *Proceedings, Ill. State Bar Assn.* (1907) pt. 2, p. 49. As to Germany generally see 15 *Proceedings N. Y. State Bar Assn.* (1892) 138.

⁴ *Commonwealth v. Lehigh Ave. Ry.* (1889) 129 Pa. St. 405, 18 Atl. 498. Dwight, *The Par Value of Stock* (1907) 16 Yale Law Journ. 247, 248. This is notably true in fixing the amount of corporation taxes. Cf. *North American Petroleum Co. v. Hopkins* (1919) 150 Kan. 161, 181 Pac. 625.

⁵ Allen, *Non Par Stock* (1920) 90 Central Law Journ. 170, 175.

⁶ Address of Edward M. Shepard (1906) *Proceedings N. H. Bar Assn.* (N. S. Vol. 2) pp. 273, 292, 293.

corporation in need of funds be obliged to increase its bonded indebtedness simply because of the impossibility of disposing of stock at its par value, as required by law generally. The new stock may be disposed of at prices fixed from time to time in a stipulated manner. Moreover the difficulties attendant upon apportioning stock in case of a consolidation or a reorganization are lessened.⁷

A movement started in New York in 1892⁸ to effectuate this reform resulted in a law enacted twenty years later⁹ authorizing all corporations, except monied corporations or those under the jurisdiction of public service commissions, to provide in their charters for the issuance of stock without par value. Since then Canada¹⁰ and thirteen states, of which the latest is Massachusetts,¹¹ have provided for the issuance of non-par value stock.

The scope of these statutes differs. Some have extended this privilege only to corporations other than those of a fiduciary or quasi public character, feeling doubtless that in such organizations the vice of the par value is attenuated by more strict supervision.¹² A hesitancy to go the whole length is also shown in provisions in many statutes that no stock preferred either as to dividends or as to principal may be issued without par value.¹³

Various means are provided for fixing from time to time the consideration for which this stock may be issued, in place of the general rule that stock with par value may not be sold at less than par. In New York,¹⁴ the shares may be sold at their "fair market value", and in the absence of fraud, the judgment of the board of directors as to such value shall be conclusive. When duly issued the shares are deemed fully paid and are non-assessable. A number of statutes require expressly that before a corporation may begin business or incur debts, its "stated capital"¹⁵ must be fully paid in. If any liabilities are incurred before this time or if such capital is impaired by the issuance of dividends therefrom, the directors are made personally, jointly and severally liable.

There is no difficulty in determining the amount of license or franchise taxes for corporations issuing stock without par value. Some states provide

⁷ *Report of the Railroads Securities Commission* (1911) pp. 25, 26.

⁸ 15 *Proceedings*, N. Y. State Bar Assn., 138.

⁹ Laws 1912, c. 351; amended by Laws 1917, cc. 500, 501; Laws 1920, cc. 606, 608.

¹⁰ Companies Act Amendment Act (1917) Pub. Gen. Acts, 7 & 8 Geo. V, c. 25, § 4.

¹¹ Me., Laws 1916, c. 596, § 9; Cal., Acts 1917, c. 701, 713; Del., Laws 1917, c. 113; Me., Laws 1917, c. 144, see Laws 1919; Ala., Acts 1919, No. 458, § 3; N. H., Laws 1917, c. 92, § 5; Ohio, Laws 1919, p. 507; Pa., Laws 1919, No. 363; Va., Acts Ex. Sess. 1919, c. 48; 1 Wis., Stat. (1919) c. 85, p. 750, § 1759b; Ill., Laws 1919, p. 323, § 28; W. Va., Acts 1920, c. 3; Mass., Acts 1920, c. 349.

¹² The exception of monied corporations must be read in the light of the Banking Law which in New York, for instance, requires that their capital stock must be fully paid. The exception of corporations regulated by commissions is criticised in Bonbright, *Railroad Capitalization* (1920) 108 *et seq.*

¹³ Preferred as to principal only: N. Y., Me., Cal. (industrial companies), Canada. Preferred as to dividends as well: Md., Wis. All preferred stocks excluded: Del., Ohio, Va. No restrictions: Ill., Pa., N. H., Cal. (public utilities), Ala.

¹⁴ Laws 1917, c. 501.

¹⁵ In New York the amount of capital may not be less than the amount of par value stock authorized to be issued (if any) and in addition thereto, a sum equivalent to \$5 for every non-par share authorized. For a criticism of this provision see Bonbright, *Railroad Capitalization* (1920) 122.

that such shares shall be taken to be, for this purpose alone, of a par value of \$100.¹⁸ In other states a fee of five cents is required for each such share.¹⁷

It can hardly be claimed that the omission of a nominal par value on corporation stock will entirely put an end to inflation.¹⁸ The chief argument for such shares is rather "truthfulness".¹⁹ It would be well to provide as an additional precaution, that officers of corporations be required to draw up estimates of their resources, plans for future operations, *etc.*, and publish them to stockholders at frequent intervals. For the accuracy of these, they should be held accountable. The fear that stocks without par value would not meet with the investor's favor, at least until he is educated to an understanding of their nature, appears to have been groundless. Stocks of corporations organized under these statutes are quoted on the exchange side by side with those with a par value and are dealt in without seeming discrimination. The number of corporations taking advantage of these statutes is increasing, as confidence in the benefits of the change is established. In New York in 1918, 168 corporations were so organized.

For the sake of uniformity, organization under these statutes should be made compulsory,²¹ and not optional; and there should be no distinction drawn between preferred and common stock, nor between "monied" and other corporations. It is confidently expected that shares without par value will entirely supplant those with par value, and thus another fiction which has outlived its usefulness and serves only to obscure the real nature of corporation shares, will be abolished.

¹⁸ Del. Ala., *etc.* In W. Va. a par value of \$25 is presumed unless the stock was originally issued for more, in which case the tax is to be computed on the actual consideration paid. For a hint of questions raised in the conflict of laws, see *Detroit Mortgage Corp. v. Vaughan* (Mich. 1920) 178 N. W. 697; (1920) 19 Mich. Law Rev. 95.

¹⁷ Wis., Mass., N. H., *etc.* It can readily be seen that the effect of this is the same as in the previously mentioned states.

¹⁸ Kuhn, *Comparative Study of the Law of Corporations* (1912) 115. Bonbright, *Railroad Capitalization* (1920) 111, 125, 126. To prove this it is sufficient to recall the extent of speculation in shares of various joint stock companies preceding the "South Sea Bubble" in England.

¹⁹ (1906) *Proceedings, N. H. State Bar Assn.* (N. S. Vol. 2) 273, 293.

²⁰ Mulvey, *Dominion Companies Law* (1920) 148.

²¹ 34 Report, *N. Y. State Bar Assn.* (1911) 77, 78. Bonbright, *Railroad Capitalization* (1920) 129. Chapter 4 of this book is an excellent discussion of this whole subject and is preceded by a bibliography.